SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 77

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

FRANK PARDEE, ARIO PARDEE, AND GIRARD TRUST COMPANY, TRUSTEES UNDER THE WILL OF CALVIN PARDEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Page
Proceedings before United States Board of Tax Appeals	1
Docket entries	1
Petition	4
Exhibit A—Deficiency letter, March 15, 1929	7
Exhibit B—Will of Calvin Pardee	9
Answer	18
Motion to amend petition	19
Stipulation re deficiency	22
Findings of fact and opinion, Arundell, M	23
Decision	25
Petition for review	26
Stipulation re will of petitioner	30
Præcipe for record	31
Clerk's certificate	33
Proceedings in U.S.C.C.A., Third Circuit	34
Argument and submission	34
Opinion, Wooley, J	34
Judgment	36
Clerk's certificate	36
Order allowing certiorari	38

United States Board of Tax Appeals.

DOCKET NO. 44362.

FRANK PARDEE, ARIO PARDEE & GIRARD TRUST CO., TRUSTEES UNDER THE WILL OF CALVIN PARDEE,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appearances:
For Petitioners: Chas. Myers, Esq.;
For Respondent: M. E. McDowell, Esq.

DOCKET ENTRIES.

May 11, 1929.	Petition received and filed. Taxpayer notified. (Fee paid.)
May 13, 1929.	Copy of petition served on General Counsel.
July 5, 1929.	Answer filed by General Counsel.
July 9, 1929.	Copy served on taxpayer—assigned to General Calendar.
Aug. 26, 1930.	Hearing set Nov. 11, 1930.
Sept. 11, 1930.	Motion for leave to amend petition filed by taxpayer—amendment tendered.
Sept. 12, 1930.	Motion granted.
Sept. 17, 1930.	Copy of motion and amended petition served on General Counsel.

Oct. 4, 1930.	Motion to place on Reserve Calendar filed by General Counsel. 10/9/30 denied.
Nov. 11, 1930.	Hearing had before C. R. Arundell, Division 7, on merits. Case held open to Dec. 11 for filing of stipulation of deficiency. Briefs due—Petitioner's Dec. 12, 1930; respondent's Jan. 12, 1930; Jan. 25 for reply.
Dec. 1, 1930.	Transcript of hearing of Nov. 11, 1930 filed.
Dec. 9, 1930.	Motion for 30 days extension to file stipulation of deficiency filed by taxpayer—granted.
Dec. 12, 1930.	Brief filed by taxpayer.
Jan. 3, 1931.	Stipulation as to deficiency filed.
Jan. 9, 1931.	Brief filed by General Counsel.
Jan. 22, 1931.	Reply brief filed by taxpayer—copy served.
Jan. 24, 1931.	Motion for leave to file brief as *amicus curiæ* filed by taxpayer. Brief on behalf of *amicus curiæ* tendered.
Jan. 26, 1931.	Order granting motion of 1/24/31 that brief tendered be received & filed, and that copy of brief be served on respondent who shall have ten days from this date (Jan. 26, 1931) to file reply brief entered.
June 23, 1931.	Findings of fact and opinion rendered —C. Rogers Arundell, Div. 7. Decision will be entered redetermining the deficiencies in the amounts stipulated.

June 29, 1931. Decision entered C. R. Arundell, Division 7.

Dec. 21, 1931. Petition for review by U. S. Circuit Court of Appeals (3) with assignments of error filed by taxpayer.

Dec. 21, 1931. Proof of service filed.

Feb. 8, 1932. Motion for 30 day extension to prepare and transmit record filed by taxpayer.

Feb. 9, 1932. Order enlarging time to Mar. 19, 1932 for preparation of evidence and delivery of record *sur* petition for review entered.

Mar. 1, 1932. Stipulation that the copy of the will attached to the Petition for redetermination is a copy of the will referred to in the Board's findings of fact filed.

Mar. 1, 1932. Præcipe filed.

Mar. 9, 1932. Proof of service filed.

Mar. 17, 1932. Order enlarging time to 4/15/32 for transmission and delivery of record entered.

PETITION.

(Filed May 11, 1929.)

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 44362.

Frank Pardee, Acio Pardee and Girard Trust Company, Trustees Under the Will of Calvin Pardee, Deceased,

Petitioners,

v.

Commissioner of Internal Revenue,

Respondent.

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:FIII 601, dated March 15, 1929, and as a basis of their proceeding allege as follows:

(a) Your petitioners are the trustees under the will of Calvin Pardee, deceased, who died March 18, 1923, a resident of White Marsh, Montgomery County, Pennsylvania, leaving a last will duly probated before the Register of Wills of said county, by the terms of which he appointed petitioners as trustees. Petitioners have received notice from the respondent that the determination of petitioners' tax liability under the Revenue Act of 1926 for the years 1924 and 1925 discloses a deficiency of $12,020, and this proceeding is brought to determine the petitioners' liability for said deficiency.

(b) The amount of the deficiency, the nature of the tax, and the years for which asserted, are set forth in

the notice received by the petitioners from the respondent, a copy of which marked Exhibit "A" is hereto attached and hereby made a part hereof.

(c) Your petitioners allege that the respondent erred in determining that petitioners are subject to a further tax liability of $12,020, for the years 1924 and 1925.

(d) Under the will of the said Calvin Pardee, deceased, a copy of which marked Exhibit "B" is hereto attached and hereby made a part hereof, he gave to his widow, Mary C. Pardee, his personal belongings at his residence, 239 West Walnut Lane, Germantown, Philadelphia, Pennsylvania, and at Churchill Farm, Whitemarsh County, Pennsylvania, the use of said residence for life and an annuity of $50,000 per annum. Said widow elected to take under said will, by writing signed and acknowledged by her delivered to the executors of the decedent, and filed and recorded as required by Section 23 of the Act of Assembly of Pennsylvania of June 7, 1917, P. L. 403.

(e) Your petitioners aver that under the Act of Assembly above referred to and Section 3 of the Act of Assembly of said State, approved June 7, 1917, P. L. 429, the provision made for decedent's widow in his will, which she elected to take, was in lieu and full satisfaction of her dower interest at common law in his estate, and is not subject to the payment of Federal income tax by the widow or by the petitioners as trustees for her. Your petitioners are further advised and therefore aver that the amount paid to said widow during the years 1924 and 1925 by the petitioners, in compliance with the terms of the decedent's will, are wholly exempt from Federal income tax.

(f) Your petitioners aver that as trustees under the will of said Calvin Pardee, deceased, they have filed income tax returns as required by law for the years 1924 and 1925, and have paid the full amount of income tax due from them under the law for said years.

(g) Wherefore, your petitioners pray that this Board may hear the proceeding and determine that the additional tax liability assessed against the petitioners for the years 1924 and 1925 under the Revenue Act of 1926, as aforesaid, was erroneously assessed.

And your petitioners will ever pray, etc.

BARNES, BIDDLE & MYERS,
By CHARLES MYERS,
Counsel for Petitioners,
1421 Chestnut Street,
Philadelphia, Pa.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

J. H. Lawson, being duly sworn according to law, deposes and says that he is trust officer of Girard Trust Company, one of the trustees under the will of Calvin Pardee, deceased, one of the above-named petitioners; that he has read the foregoing petition and is familiar with the statements contained therein and that the facts stated herein are true, except as to those facts stated on information and belief, and those facts he believes to be true.

J. H. LAWSON.

Sworn to and subscribed before me this ninth day of May, A. D. 1929.

DANIEL L. CULLEN,
Notary Public.
(Seal)
Commission expires March 2, 1933.

"EXHIBIT A."

TREASURY DEPARTMENT

Washington

March 15, 1929

IT:FIH-60D

Est. Calvin Pardee
c/o Girard Trust Co.
Phila., Pa.

In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the years 1924 & 1925 discloses a deficiency of $12,020.00, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, If You Do Not Desire to Petition, you are requested to execute the inclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C. for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; Whereas if No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

D. H. Blair,
Commissioner,
By J. S. MacLaughlin
Collector of Internal Revenue.

STATEMENT

IT:FHH-60D

March 15, 1929

In re: Est. Calvin Pardee
c/o Girard Trust Co.
Phila., Pa.

Year	*Corrected Tax Liability*	*Tax Previously Assessed*	*Deficiency*
1924			$6540.00
1925			5480.00
Total			$12020.00

In accordance with the decision in the case of Warner v. Walsh (15 Fed. 2d) 367, the amounts paid a widow who elects to accept a testamentary provision for the payment to her of a certain sum annually of trust income in lieu of dower, should be regarded as capital expenditures applied in purchase of her dower right and not as distributions of income to a beneficiary. In other words the particular estate or trust should be held subject to the tax accruing upon the amounts of income turned over to the widow.

Therefore, the amounts paid annually to Mrs. Mary C. Pardee by the Estate of Calvin Pardee as shown by the returns Form 1041 filed by you as trustee for 1924 and 1925 are taxable to the Estate.

"EXHIBIT B."

I, CALVIN PARDEE, of Whitemarsh, Montgomery County, Pennsylvania, do make this my last Will and Testament, hereby revoking all other Wills at any time heretofore made by me.

FIRST. I give unto my beloved wife, Mary C. Pardee, all my household furniture, paintings, silver plate, automobiles and personal articles which may be found at my residence and garage at 239 West Walnut Lane, Germantown, and also all the personal property of every kind belonging to me at Churchill Farm, Whitemarsh, Pennsylvania, and I direct my Executors to deliver the same to my wife without making any inventory thereof.

SECOND. I direct that my beloved wife shall have the sole use of the residence at 239 West Walnut Lane, Germantown, during her life, free of all charges and I direct that all taxes, repairs and insurance shall be paid by my Executors and Trustees hereinafter named, out of my residuary estate, and I further direct my Executors and Trustees to employ a watchman who shall sleep on the premises when they are unoccupied and who shall be employed during the day in the care of the property.

THIRD. I also give unto my said wife an annuity of Fifty thousand Dollars ($50,000.), to be computed from the date of my decease and to be paid in advance in quarterly payments.

FOURTH. I give, devise and bequeath unto my son Alfred Day Pardee, in fulfillment of a verbal promise which I have made to him, two hundred and fifty (250) shares of the capital stock of the Blackwood Coal and Coke Company, unless I shall have performed said promise in my lifetime.

Fifth. I direct that my daughter, Helen Pardee Foulke, shall be allowed to occupy, free of rent, the Mather Mill House and property purchased by me from Frank Godey, and also the Old Mather or Witte Mill building on the Wissahickon, at Whitemarsh, or either of said premises, as long as she desires to do so, and that during her occupancy the taxes and other charges which may be assessed against said property, together with the cost of all reasonable repairs necessary or desirable to keep the properties in good condition, shall be paid by my estate.

Sixth. I give, devise and bequeath to Lafayette College the sum of Fifty thousand Dollars ($50,000.) free and clear of all inheritance and succession taxes, In Trust to invest the same and keep the same invested in good and safe securities and to collect the income thereof and apply the same toward the maintenance of Pardee Hall now belonging to said College.

Seventh. I give, devise and bequeath to Princeton University the sum of Fifty thousand Dollars ($50,000.), free and clear of all inheritance and succession taxes, In Trust, to invest the same and keep the same invested and to collect the income thereof and to apply such income for the maintenance of the University in such way as from time to time shall seem best to the Board of Trustees thereof.

Eighth. I give to the Rensselaer Polytechnic Institute of Troy, New York, in addition to the amount heretofore contributed by me to that institution, the sum of Forty thousand Dollars ($40,000.), free and clear of all inheritance and succession taxes, to be used by said Institute in the erection of a dormitory in memory of my brother Ario Pardee, Jr., of the Class of 1858, and of myself as a member of the Class of 1860.

NINTH. All the rest, residue and remainder of my property, real and personal, including that which may be hereafter acquired and inherited, I give, devise and bequeath absolutely and in fee simple unto the Girard Trust Company and its successors, to my brother Frank Pardee and to my son Ario Pardee and the survivors or survivor of them; IN TRUST NEVERTHELESS, to collect the rents, income, profits and dividends thereof and, after payment of the expenses of the trust, to pay to my said wife the annuity of Fifty thousand Dollars ($50,000.) which I have hereinbefore given to her.

IN TRUST, subject to the aforesaid payment to my said wife in full, to divide the rest, residue and remainder of said net income, quarterly, into eight equal parts.

One equal part I direct shall be paid to my son Ario Pardee;

One equal part I direct shall be paid to my daughter Estelle Pardee Erdman;

One equal part I direct shall be paid to my daughter Helen Pardee Foulke;

One equal part I direct shall be paid to my son Alfred Day Pardee;

One equal part I direct shall be paid to my son Howard Pardee;

One equal part I direct shall be paid to my daughter Olive Pardee;

One equal part I direct shall be paid in equal shares to my grandchildren Lucia A. Warden and Herbert W. Warden, Jr., children of my daughter Alice Pardee Warden, now deceased; and

One equal part I direct shall in the absolute discretion of my Trustees, be paid to my grandson Calvin Pardee, 3rd, son of my son Calvin Pardee, Jr., now deceased, quarterly as it accrues, or expended for his support and maintenance as his needs may require.

If any one of the nine beneficiaries aforesaid shall die during the lifetime of my wife, leaving issue, I direct that the share of income which would have been payable to such beneficiary if living shall be paid to such issue.

In the event that either my granddaughter Lucia A. Warden or my grandson Herbert W. Warden, Jr. shall die leaving no issue, I direct that the share of the grandchild thus dying shall be paid to the other of said grandchildren. Upon the death of both of my said grandchildren leaving no issue and upon the death of any one of the other seven beneficiaries leaving no issue, I direct that the share of income which would have been payable to such beneficiary if living, shall be divided among the remainder of said beneficiaries in the proportion in which they are then receiving income under the foregoing provisions of my Will.

In Trust, upon the death of my said wife to set aside and hold in trust so much of the principal of my estate as shall in the opinion of my Trustees be sufficient to provide an income of at least Twenty thousand Dollars ($20,000.) per annum and to hold the same In Trust until all my grandchildren living at the time of my death shall have attained the age of thirty (30) years; for the following uses and purposes:—

In Trust, to divide the net income thereof quarterly into as many parts or shares as there shall be grandchildren of mine living at the time of each quarterly distribution and grandchildren of mine then dead, represented by descendants then living; to pay over to each grandchild then living one of said parts or shares; to subdivide one of said parts or shares to and among the issue of any grandchild of mine then dead, per stirpes, upon the principle of representation; and to pay over to each of such issue who shall at each of

such times be found to be entitled, his or her share, as so ascertained, in fee.

In Trust, when all of my grandchildren living at the time of my death shall have attained the age of thirty (30) years, to divide the principal of said fund to and among all my grandchildren then living and the descendants of any grandchild of mine then dead in the same proportions as hereinbefore provided with respect to the income of said fund.

In Trust, upon the death of my wife and after setting aside the fund aforesaid for the benefit of my grandchildren, to divide the residue and remainder of the principal of said trust fund into eight equal parts.

One equal part I give, devise and bequeath to my daughter Estelle Pardee Erdman absolutely.

One equal part I give, devise and bequeath to my daughter Helen Pardee Foulke, absolutely.

One equal part I direct shall be subdivided into two equal shares and I give one of said shares to my granddaughter Lucia A. Warden and the other of said shares I give to my grandson Herbert W. Warden, Jr. If either of my said two grandchildren shall then be deceased, leaving issue, the share hereby given such grandchild shall be subdivided in equal parts among said issue. If either of my said grandchildren shall then be dead, leaving no issue, such grandchild's share shall be added to and become part of the share of the other of said grandchildren or of his or her issue, as the case may be. If both of my said grandchildren shall then be dead, leaving no issue, the share hereby given to them shall be divided among the shares of the other persons then entitled to a share under the provisions of this clause of my Will, in the same proportions in which the principal of my estate is hereby divided; and the amount thus ascertained shall be added to the principal of each share and treated as a part thereof.

One equal part I direct shall be held by my Trustees In Trust to collect the income thereof and to pay the net income, quarterly, to my son Arlo Pardee for and during the period of his natural life.

One equal part I direct shall be held by my Trustees In Trust to collect the income thereof and to pay the net income, quarterly, to my son Alfred Day Pardee for and during the term of his natural life.

One equal part I direct shall be held by my Trustees In Trust to collect the income thereof and to pay the net income quarterly to my son Howard Pardee for and during the term of his natural life.

One equal part I direct shall be held by my Trustees In Trust to collect the income thereof and to pay the net income quarterly to my daughter Olive Pardee for and during the term of her natural life; and

One equal part I direct shall be held by my Trustees In Trust to collect the income thereof and to pay the net income quarterly to my grandson Calvin Pardee, 3rd for and during the period of his natural life.

Upon the death of any of my said children Arlo Pardee, Alfred Day Pardee, Howard Pardee and Olive Pardee or of my said grandchild Calvin Pardee, 3rd, the principal of the share of which such descendant shall have been receiving the income shall be distributed, per stirpes upon the principle of representation, to such issue as such descendant shall leave surviving him or her. If such descendant shall leave no issue him or her surviving, such share of the principal of my estate shall be divided into as many parts or shares as there shall be children of mine then living and children of mine then dead represented by descendants then living, and such parts or shares shall be added to the shares of which such descendants of mine shall then be entitled, under the provisions of this my Will, to receive

either principal or income as the case may be; and shall be treated as part of such shares.

TENTH. My Executors and Trustees shall have during the activity of any trusts hereby created, not in substitution for the ordinary powers of testamentary trustees under the laws of Pennsylvania, but in addition thereto, the following special powers:

1. To retain any securities which they may receive for the purposes of the trusts hereby declared, and from time to time to alter such investments and to make new investments in such real or personal property as Trustees deem reasonably safe investments for trust funds, without being confined to what are technically known as "legal investments".

2. To sell any or all real or personal estate held by them for the purposes of the trust, at public or private sale, and to make good deeds or other instruments of conveyance thereof in fee simple or for any less estate, without any obligation on the part of the purchaser or purchasers to see to, or be responsible for the application of the purchase money.

3. To lease, mortgage, repair, alter or improve any property held by them under the terms of the trust.

4. To buy any mortgaged premises at any judicial sale.

5. To purchase investments at a premium and to charge the premium either to principal or income, or partly to principal and partly to income, as they shall deem best.

6. To exercise any option to subscribe for new stocks or bonds or certificates, which may be given to

them as the holders of any stocks or bonds or certificates belonging to the trust estate.

7. To join in any plan of lease, merger or consolidation, exchange, reorganization, or foreclosure of any corporation in which Trustees shall hold stocks, bonds or other securities, and to deposit such stocks, bonds or other securities thereunder and to accept new securities under such plan.

Eleventh. In case any beneficiary of income shall be unable, through sickness or otherwise, to receive and receipt for the income to which he or she is entitled at the time of any distribution Trustees shall apply such income to the benefit of such beneficiary in such way as in the Trustees' uncontrolled discretion shall seem best.

Twelfth. All distributions of income and principal herein provided for shall be so made that the same shall not be capable of anticipation, nor subject to execution nor attachment, nor be in any other way subject to the debts, contracts or engagements of such beneficiaries.

Thirteenth. All stock dividends or proceeds of sale of rights to subscribe for stock upon any stock which may from time to time be held by my Executors and Trustees, shall be treated as principal and not as income.

Fourteenth. I direct my Executors and Trustees to charge no interest on any moneys which may be due my estate by any of my children and to give my children ample time to repay any such loans. I further direct my Executors and Trustees to act in harmony with my brothers and sisters in the disposal of any real estate inherited from my Father and in which I may still own an undivided interest.

LASTLY. I appoint the Girard Trust Company of Philadelphia, my brother Frank Pardee and my son Arlo Pardee to be the Executors and Trustees of this my last Will and Testament and direct that they shall not be required to give any security for the faithful performance of their duties as such.

I request them, unless required by law so to do, not to file in any public office any inventory of my property and estate; but to cause a proper inventory to be made under the direction of my Executors, and to preserve the same among the books and papers of my Estate, so that any and all persons having an interest under my Will may have access thereto at any time.

IN WITNESS WHEREOF I have hereunto set my hand and seal this third day of November A. D. One thousand nine hundred and twenty (1920).

CALVIN PARDEE (SEAL)

SIGNED, SEALED, PUBLISHED and DECLARED by the above named CALVIN PARDEE as and for his last Will and Testament in the presence of us, who, in his presence, at his request, and in the presence of each other, have hereunto set our hands as attesting witnesses.

CARLYLE H. ROSS
421 W. Johnson St. Gtn. Phila.
JAMES WILSON BAYARD
105 East Johnson St. Germantown, Phila.

This is a true and correct copy.

GIRARD TRUST COMPANY

J. H. HOULIT,
Asst. Trust Officer.

ANSWER.

(Filed July 5, 1929.)

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(a) and (b). Admits the allegations contained in paragraphs (a) and (b).

(c). Denies that he erred in determining the tax set forth in said notice of deficiency and further denies that he erred as alleged in paragraph (c) of the petition.

(d) and (e). Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs (d) and (e) of the petition, and therefore denies the same.

(f). Denies the allegations contained in paragraph (f).

(g). Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:

L. A. LUCE,
Special Attorney, Bureau of Internal Revenue.

MOTION BY PETITIONERS TO AMEND PETITION.

(Filed September 11, 1930.)

Come now the petitioners, by their attorneys, and move the Board for leave to amend their petition by filing and attaching thereto the affidavits of Frank Pardee and Ario Pardee hereto attached.

BARNES, BIDDLE & MYERS,
By CHARLES MYERS,
Attorneys for Petitioners.

Granted September 12, 1930.

(Sgd.) JOHN M. STERNHAGEN,
Member, United States Board of Tax Appeals.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.:*

FRANK PARDEE, being duly sworn according to law, deposes and says that he is one of the trustees under the will of Calvin Pardee, deceased, and one of the petitioners named in the petition filed in this proceeding; that he has read said petition and is familiar with the statements therein contained, and the facts stated therein are true and correct; that the above-mentioned petition shall have the same force and effect as though deponent had joined therein and added to said petition an affidavit similar to the one made by his co-trustee; and that the petition filed by deponent's co-trustee, Girard Trust Company, was filed with the consent of this deponent.

FRANK PARDEE.

Sworn to and subscribed before me this ninth day of September, 1930.

DANIEL L. CULLEN,
(Seal) *Notary Public.*
My commission expires March 2, 1933.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.:*

ANIO PARDEE, being duly sworn according to law, deposes and says that he is one of the trustees under the will of Calvin Pardee, deceased, and one of the petitioners named in the petition filed in this proceeding; that he has read said petition and is familiar with the statements therein contained, and the facts stated therein are true and correct; that the above mentioned petition shall have the same force and effect as though deponent had joined therein and added to said petition an affidavit similar to the one made by his co-trustee; and that the petition filed by deponent's co-trustee, Girard Trust Company, was filed with the consent of this deponent.

ANIO PARDEE.

Sworn to and subscribed before me this fourth day of September, 1930.

CALVIN B. WOOD,
(Seal) *Notary Public.*
My commission expires March 6, 1931.

STIPULATION.

(Filed January 3, 1931.)

It is hereby stipulated and agreed by and between the parties to the above entitled proceeding, through their respective counsel of record, that if the respondent's determination in regard to the issue raised in the petition herein is sustained, that there are deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $1532.94 and $3017.64 against these petitioners as trustees under the will of Calvin Pardee, deceased.

(Sgd.) CHARLES MYERS,
Counsel for Petitioners.

(Sgd.) C. M. CHAMBER,
General Counsel, Bureau of Internal Revenue.

FINDINGS OF FACT AND OPINION.

(Promulgated June 23, 1931.)

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 44362.

Frank Pardee, Ario Pardee and Girard Trust Company, Trustees Under the Will of Calvin Pardee, Deceased,

Petitioners,

v.

Commissioner of Internal Revenue,

Respondent.

Payments made by trustee to decedent's widow, she having elected to take under the will in lieu of dower, are not deductible in computing trust income. *Julia Butterworth, et al.*, 23 B. T. A. , followed.

Charles Myers, Esq., for the petitioners.

M. E. McDowell, Esq., for the respondent.

The respondent in this case asserted deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $6,540 and $5,480. The parties have stipulated that in the event the case is decided in favor of the respondent the correct deficiencies are $1,532.94 and $3,617.64.

FINDINGS OF FACT.

The petitioners herein are executors and trustees of the Estate of Calvin Pardee, who died testate on March 18, 1923, while a resident of Pennsylvania. The will, dated November 3, 1920, and duly admitted to probate, after making provisions for the disposal of

certain personal belongings and a life estate for his wife in the deceased's residence, provided in part as follows:

> "Third: I also give unto my said wife an annuity of . . . $50,000. to be computed from the date of my decease and to be paid in advance in quarterly payments."
>
> . . . . . .
>
> "Ninth: All the rest, residue and remainder of my property, real and personal, ... I give, devise and bequeath absolutely and in fee simple unto the Girard Trust Company and its successors, to my brother . . . and son . . . , IN TRUST NEVERTHELESS, to collect the rents, income, profits and dividends thereof, and after payment of the expenses of the trust, to my said wife the annuity of . . . $50,000. which I have hereinbefore given to her."

Provision was made for the disposition of the corpus following the death of the deceased's widow. By writing, signed, acknowledged, delivered to the executors of the decedent, and duly filed and recorded as required by the statutes of Pennsylvania, Marey C. Pardee, the widow elected to take under the will in lieu of the interest she would have been entitled to in the decedent's estate had he died intestate. During 1924 and 1925 the trustees made payments to the widow as provided for under the will, which amounts, added to payments of prior years, did not aggregate a sum equal to that which would have been apportionable to her as of the date of deceased's death under the Pennsylvania statutory provisions had she not elected to take under the will.

In filing returns for the years 1924 and 1925 the petitioners as trustees, when computing taxable net income, deducted from gross income the amounts distributed to the widow in the same manner as they deducted amounts similarly distributed to other beneficiaries under the testamentary trust.

OPINION.

ARUNDELL:

This case is ruled by that of *Julia Butterworth et al.*, 23 B. T. A. —, decided this day and we accordingly hold that the trustees are not entitled to deduct the payments made to the widow in the taxable years.

The only distinction between the *Butterworth* case and this one is that in that case the payments to the widow were limited to the income from the trust property, whereas here the widow is given the annual sum of $50,000, which though payable primarily out of income, was payable at all events and if the income proved insufficient the trustees might invade the corpus of the trust to make up the deficiency. See *Sybil Whitehouse*, 7 B. T. A. 600; affirmed, 38 Fed. (2d) 162; and 282 U. S. —. This distinction, if it makes any difference, presents a stronger case for the respondent than the *Butterworth* case in view of the holding in the *Whitehouse* case that annuities are not income and the recipient of an annuity does not receive a distributive share of the trust income.

Reviewed by the Board.

Decision will be entered redetermining the deficiencies in the amounts stipulated.

DECISION.

(Filed June 29, 1931.)

Pursuant to the Board's findings of fact and opinion, promulgated June 23, 1931, it is

ORDERED and DECIDED: That there are deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $1,532.94 and $3,617.64.

(Sgd.) C. ROGERS ARUNDELL,
Member, United States Board of Tax Appeals.

PETITION OF FRANK PARDEE, ARIO PARDEE AND GIRARD TRUST COMPANY, TRUSTEES UNDER THE WILL OF CALVIN PARDEE, DECEASED, FOR REVIEW BY THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT OF A DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

(Filed December 21, 1931.)

The above named petitioners, by Charles Myers, their attorney, hereby petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the United States Board of Tax Appeals in the case of Frank Pardee, Ario Pardee and Girard Trust Company, trustees under the will of Calvin Pardee, Deceased, Petitioners v. Commissioner of Internal Revenue, Respondent, Docket No. 44,362, entered June 29, 1931, finding deficiencies in petitioners' income taxes for the calendar years 1924 and 1925 in the respective amounts of $1,532.94 and $3,617.64, and respectfully show:

1. Nature of the Controversy.

The petitioners are executors and trustees under the Will of Calvin Pardee, who died testate on March 18, 1923, while a resident of Whitemarsh, Montgomery County, Pennsylvania, leaving a last will duly probated before the Register of Wills of said county, by the terms of which he appointed petitioners as trustees. The will, dated November 3, 1920, after making provisions for the disposal of certain personal belongings and a life estate for his wife in the deceased's residence, provided in part as follows:

"Third: I also give unto my said wife an annuity of . . . $50,000. to be computed from the

date of my decease and to be paid in advance in quarterly payments.

"Ninth: All the rest, residue and remainder of my property, real and personal, . . . I give, devise and bequeath absolutely and in fee simple unto the Girard Trust Company and its successors, to my brother . . . and son . . . IN TRUST NEVERTHELESS, to collect the rents, income, profits and dividends thereof, and after payment of the expenses of the trust, to my said wife the annuity of . . . $50,000, which I have hereinbefore given to her.

"IN TRUST, subject to the aforesaid payment to my said wife in full to divide the rest, residue and remainder of said net income, quarterly, into eight equal parts."

Testator directed that the eight equal parts of the income from the residue of his estate should be paid to his children and grandchildren named therein, and made provision for the disposition of the corpus following the death of his widow, children and grandchildren. By writing, signed, acknowledged, delivered to the executors of the decedent, and duly filed and recorded as required by the statutes of Pennsylvania, Mary C. Pardee, the widow, elected to take under the will in lieu of the interest she would have been entitled to in the decedent's estate had he died intestate.

During 1924 and 1925, the trustees made payments to the widow as provided for under the will, which amounts, added to payments of prior years, did not aggregate a sum equal to that which would have been apportionable to her as of the date of deceased's death under the Pennsylvania statutory provisions had she not elected to take under the will.

In filing returns for the years 1924 and 1925 the petitioners as trustees, when computing taxable net income, deducted from gross income the amounts dis-

tributed to the widow in the same manner as they deducted amounts similarly distributed to other beneficiaries under the testamentary trust.

On March 15, 1929, the Commissioner of Internal Revenue, by J. S. MacLaughlin, Collector, mailed to your petitioners a deficiency letter stating therein that the determination of petitioners' tax liability for the years 1924 and 1925 disclosed a deficiency of $12,020 in income taxes for said years.

Within sixty days from the date of said deficiency letter, to wit, on May 11, 1929, your petitioners filed their petition with the United States Board of Tax Appeals, appealing from the aforesaid determination of the Commissioner of Internal Revenue.

After hearing before the United States Board of Tax Appeals on November 11, 1930, the said Board on June 29, 1931, promulgated its findings of fact and opinion, in which it held that under Section 249 of the Revenue Act of 1924, the petitioners, in computing the net income of the decedent's estate subject to income tax for the calendar years 1924 and 1925, were not entitled to deduct the amounts distributed to the decedent's widow, and on June 29, 1931, the Board, pursuant to said findings of fact and opinion, ordered and decided that there are deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $1,532.94 and $3,617.64, the parties having stipulated that if the respondent should be sustained in his disallowance of the deductions claimed, the correct deficiencies are in the amounts stated.

II. Court in Which Review Is Sought.

Petitioners aver that their income tax returns for the calendar years 1924 and 1925 were filed in the office of the Collector of Internal Revenue for the First District of Pennsylvania, at Philadelphia, Pennsyl-

vania, which Collector's office is located within the Third Circuit, and this appeal is therefore taken to the United States Circuit Court of Appeals for the Third Circuit pursuant to Section 1002 of the Revenue Act of 1926.

III. Assignments of Error.

(1) The United States Board of Tax Appeals erred in refusing to allow as a deduction in computing the net taxable income of the trustees under the will of Calvin Pardee, deceased, for the calendar years 1924 and 1925, the amount of the income of the trust that was distributed to the decedent's widow during said years.

(2) The United States Board of Tax Appeals erred in holding that the widow of Calvin Pardee, is not a "Beneficiary" of his estate.

(3) The United States Board of Tax Appeals erred in entering final judgment for the Commissioner of Internal Revenue, as follows:

> "Pursuant to the Board's findings of fact and opinion, promulgated June 23, 1931, it is Ordered and Decided: That there are deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $1,532.94 and $3,617.64."

Charles Myers,
Attorney for Petitioners.
1421 Chestnut Street,
Philadelphia, Pa.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } ss.:

CHARLES MYERS, being duly sworn according to law, deposes and says that he is counsel of record in the above entitled cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true and correct to the best of his knowledge, information and belief.

CHARLES MYERS.

Sworn to and subscribed before me this eleventh day of December, A. D. 1931.

HELEN G. GABELL,
(Seal) *Notary Public.*
My commission expires January 6, 1935.

STIPULATION.

(Filed March 1, 1932.)

It is hereby stipulated and agreed by and between the parties to the above entitled proceeding, through their respective counsel of record, that the copy of the will attached to the petition for redetermination is a copy of the will referred to in the Board's findings of fact, which was received in evidence at the hearing before the Board on November 11, 1930.

(Sgd.) CHARLES MYERS,
Counsel for Petitioners.
(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

PRÆCIPE FOR RECORD.

(Filed March 1, 1932.)

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and on or before March 19, 1932, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Third Circuit, a transcript of the record in the above cause, prepared and transmitted as required by law and the rules of said Court, and to include in said transcript of record, copies of the following documents duly certified as correct:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:

(a) Petition for redetermination, including exhibits attached thereto.

(b) Answer of the respondent.

(c) Motion by petitioners to amend petition granted September 12, 1930.

(d) Stipulation setting forth the amount of deficiencies if the respondent's determination is sustained.

(3) The findings of fact and opinion of the Board of Tax Appeals.

(4) The decision of the Board.

(5) The petition for review filed by the petitioners in the above cause.

(6) Stipulation that the copy of the will attached to the petition for redetermination is a copy of the will referred to in the Board's findings of fact.

(Sgd.) CHARLES MYERS,
Attorney for Petitioners.
1421 Chestnut Street,
Philadelphia, Pa.

Service of a copy of the foregoing praecipe for the record accepted this day of March, 1932.

.....
Attorney for Respondent.

CERTIFICATE.

I, B. D. Gamble, Clerk of the United States Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 30, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this twenty-first day of March, A. D. 1932.

B. D. Gamble,
Clerk.

(Seal)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 4903. October term, 1933

FRANK PARDELL ET AL., TRUSTEES UNDER WILL CALVIN PARDEE, petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

And afterwards, to wit, the 6th day of October 1932, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Victor B. Woolley, Honorable J. Warren Davis, and Honorable J. Whitaker Thompson, circuit judges, and the court not being fully advised in the premises, takes further time for the consideration thereof,

And aftrewards, to wit, on the 4th day of March 1933, come the parties aforesaid by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals, for the Third Circuit

No. 4903. October term, 1932

FRANK PARDEE, ARIO PARDEE, AND GIRARD TRUST COMPANY, TRUSTEES Under the Will of Calvin Pardee, petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for review from the United States Board of Tax Appeals

Opinion

(Filed March 4, 1933)

Before WOOLLEY, DAVIS and THOMPSON, Circuit Judges

WOOLLEY, Circuit Judge:

Calvin Pardee, a resident of Pennsylvania, died in 1923. By his will he bequeathed and devised certain property to his wife absolutely. He then gave her "an annuity of $50,000", but by a later paragraph in the will conveyed the residue of his estate to trustees in trust to collect income and pay his wife the annuity which thereinbefore he had given her. Other provisions of the will indicate the annuity was for life, with remainders over as to the corpus.

The testator's wife elected to take under the will in lieu of the interest in her husband's estate which the law of Pennsylvania gave her.

During 1924 and 1925, the tax years in question, the trustees made payments of income to the widow in amounts which, together with payments made in other years, were less than the value of her statutory interest in her husband's estate, had she elected to take against the will.

In computing taxable net income in their returns for the stated tax years, the trustees deducted the income they had distributed to the widow in paying the annuity. They did this under the literal terms of section 219 of the Revenue Acts of 1924 and 1926 (43 Stat. 269; 44 Stat. 9). The Commissioner of Internal Revenue, being influenced by the decisions in Warner v. Walsh, 15 Fed. (2d) 807; United States v. Bolster, 26 Fed. (2d) 700 and Allen v. Brandies, 29 Fed. (2d) 393, disallowed the deductions and assessed deficiency taxes against the trustees. On appeal the United States Board of Tax Appeals sustained the Commissioner on authority of its decision in Julia Butterworth, et al., Trustees, 23 B.T.A. 880. The case is in this court on the trustees' petition to review the action of the Board.

The question decided by the Board and submitted here for review—the right of a trustee under the statutes, when computing taxable income, to deduct income distributed, after election, to a widow as beneficiary—is the same question decided in different ways by the Board and by this court in Butterworth v. Commissioner, Fed. (2d) , arising, however, from a different state of facts. In the Butterworth case as in the three cited cases in the Circuit Courts of Appeals, the widow received income from the trust. In none of these cases was she entitled to principal. In none was her interest an annuity in a purely technical sense. The latter three cases held, however, that her interest in the trust was, on her election, "in fact and in legal effect the purchase of an annuity", limited, however, to income; whereas in the instant case the bequest is of a fixed annuity which, though payable primarily out of income, is seemingly payable at all events, whether from income or principal.

On this difference between the cases referred to and the present case, the Board cited and the Government relies on Commissioner v. Whitehouse, 7 B.T.A. 600, affirmed in 38 Fed. (2d) 162, and in turn affirmed in 283 U.S. 148, as making this case even stronger than Butterworth v. Commissioner. In Commissioner v. Whitehouse the court held that where an annuity is bequeathed as a definite sum payable at all events, payments "received" by the donee (not there a widow) are not part of the donee's gross income but are exempted therefrom as property acquired by gift or bequest. Thus it appears that in Commissioner v. Whitehouse and in the cases in the Circuit Courts of Appeals on which the Board founded its decision in the Butterworth case, the courts were concerned, and concerned only, with the tax liability of the recipients of trust funds. None of these cases dealt with the tax liability of trust estates with respect to income paid to a widow or annuitant. They decide simply that the widow

in the one case, and the annuitant in the other, is, for different reasons, exempted from taxes, and unless it follows that, because of such exemption, the income is taxable to the trust estate, they afford no authority for the Board's conclusion. The question with which we are concerned is not the tax liability of a widow or annuitant, but the liability of the trust estate to pay taxes from which she is exempt. The fact that the annuity was given to a widow lends nothing to the case. It makes no difference whether it is to a widow or to a daughter, as the sole question is whether an annuitant, be she widow or someone else, is a beneficiary within the terms of the statutes under review and in the sense in which the word is ordinarily used and understood. If she is a beneficiary, the trustees were allowed by the statutes to deduct distributions of income made to her. This brings us back to the reasons for our decision in Butterworth v. Commissioner which, we hold, rules the instant case and calls for a reversal of the judgment of the Board of Tax Appeals.

THOMPSON, Circuit Judge, dissenting.

A true copy: Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

In the United States Circuit Court of Appeals for the Third Circuit

No. 4903. October term, 1932

FRANK PARDEE ET AL., TRUSTEES UNDER WILL OF CALVIN PARDEE, petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby reversed.

PHILADELPHIA, *March 4, 1933.*

VICTOR B. WOOLLEY, *Circuit Judge.*

(Endorsements:) 4903. Order reversing decree. Rec'd & filed Mar. 4, 1933. William P. Rowland, clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit. Set.

I, William P. Rowland, clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original transcript of record and

proceedings in this court in the case of Frank Pardee et al., trustees under will of Calvin Pardee, petitioners, vs. Commissioner of Internal Revenue, respondent, no. 4008, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof I have hereunto subscribed by name and affixed the seal of the said court, at Philadelphia, this 20th day of April in the year of our Lord one thousand nine hundred and thirty-three and of the independence of the United States the one hundred and fifty-seventh.

WM. P. ROWLAND,
Clerk of the U.S. Circuit Court of Appeals, Third Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1933

Supreme Court of the United States

Order allowing certiorari

Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1933